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UNITED STATES SUPREME COURT
OCTOBER 1994 TERM

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LIBERTY SEAFOOD, INC.,
PETITIONER

VS

HERNDON MARINE PRODUCTS, INC.,
RESPONDENT

* *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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QUESTIONS PRESENTED FOR REVIEW

The sole issue for this Court's review is whether a tortfeasor ship owner can recoup maintenance and cure payments under general maritime law from a co-defendant tortfeasor which had settled in good faith with the plaintiff seamen.

PARTIES IN THE UNITED STATES COURT OF APPEALS

There is no parent or subsidiary to be listed for either party.

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OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion delivered by the United States Court of Appeals for the Fifth Circuit regarding the judgment sought to be reviewed was officially published in *Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 38 F.3d 755 (5th Cir. 1994).

JURISDICTIONAL GROUNDS

1. The judgment sought to be reviewed was entered on November 10, 1994.

2. No orders respecting rehearing were entered or requested; no orders granting an extension of time to file a petition for writ of certiorari were entered or requested.

3. 28 U.S.C. § 1254(1) provides the United States Supreme Court with jurisdiction to review cases in the courts of appeals after rendition of judgment by writ of certiorari granted upon petition of any party to any civil case.

CONSTITUTIONAL CITATIONS

The judgment sought to be reviewed was based wholly upon interpretation and application of general maritime law; there are no constitutional references involved in the case.

STATEMENT OF THE CASE

On the afternoon of March 3, 1991, two shrimp trawlers, the F/V GLORIA B and F/V GULF KING 31, collided in the Gulf of Mexico. Liberty Seafood, Inc. ("Liberty") owned the GLORIA B, and Herndon Marine Products, Inc. ("Herndon") owned the GULF KING 31. Liberty filed a complaint for exoneration from and/or limitation of liability pursuant to 46 U.S.C. § 181 *et seq.* and FED. R. CIV. P. F, SUPP. R. ADM. & MAR. CLAIMS. Herndon answered and filed claim against Liberty and the GLORIA B. Liberty answered and counterclaimed against Herndon. Three seamen aboard the GULF KING 31 also answered Liberty's claim for exoneration and/or limitation of liability, and they also filed negligence and unseaworthiness

claims against Liberty. Liberty answered the crewmen's complaints, contending in part that each seaman was contributorily negligent.

Prior to trial, each of the seamen settled with Liberty and dismissed with prejudice of all of their claims against Liberty. Also before trial, Liberty moved to dismiss Herndon's claims for reimbursement of maintenance and cure payments pursuant to FED. R. CIV. P. 12(b)(6). The district court found both Herndon (25%) and Liberty (75%) at fault for the collision and denied Liberty's claims for exoneration and limitation of liability. Because the seamen were no longer parties, no findings were made regarding their individual comparative fault.

The trial court granted Liberty's motion to dismiss Herndon's claims for indemnity and contribution. Noting that "[t]he Fifth Circuit has not squarely addressed the issue whether a settlement bar exists for claims seeking to recoup maintenance and cure payments from a settling tort-feasor," the court relied upon the reasoning of the Eighth Circuit, which had confronted

this precise issue in *Associated Elec. Coop. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1991). Finding no reason to suspect the settlements between Liberty and the crewmen were entered into in bad faith, Judge Gibson dismissed Herndon's claims as barred by Liberty's settlements with the crewmen aboard the GULF KING 31.

While Herndon's appeal of the district court's order was pending, Herndon and Liberty resolved their claims against each other except for Herndon's claim for reimbursement of maintenance and cure payments. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal of Herndon's claims for reimbursement of maintenance and cure payments and remanded the case to the district court.

BASIS OF JURISDICTION IN THE DISTRICT COURT

The court of first instance, the United States District Court for the Southern District of Texas, Galveston Division, had original jurisdiction over this civil maritime case pursuant to 28

U.S.C. § 1333(1).

ARGUMENT

The Fifth Circuit's judgment permitting a defendant ship owner reimbursement from a settling co-defendant directly conflicts with decision of the Eighth Circuit in *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1990), which precludes contribution claims for maintenance and cure payments from a settling co-defendant as a matter of law. Moreover, the Fifth Circuit's decision contravenes the principles recently set forth by this Court in *McDermott, Inc. v. AmClyde*, 114 S.Ct. 1461 (1994), which adopted the proportionate fault approach to calculating a non-settling defendant's liability, precluding contribution claims against a settling co-defendant as a matter of law.

STANDARD OF REVIEW

A district court properly dismisses an action for failure to

state a claim when it appears beyond doubt that the non-movant can prove no set of facts in support of his claim. *E.g.*, *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957) (*construing* FED. R. CIV. P. 12(b)(6)).

SETTLEMENT AS A BAR TO CONTRIBUTION CLAIMS

In *McDermott*, this Court discussed the three possible approaches to calculating the liability of a non-settling defendant: the *pro tanto* method without contribution, the *pro tanto* method with contribution, and the proportionate share method. 114 S.Ct at 1465-70 (citing RESTATEMENT (SECOND) OF TORTS § 886A, pp. 343-44 (1977)). The Court ultimately adopted the third approach for its promotion of settlement and judicial economy and consistency with the proportionate fault approach in *United States v. Reliable Transfer Co., Inc.*, 95 S.Ct. 1708 (1975). 114 S.Ct. at 1470.

Under the proportionate share method, a non-settling defendant's total liability to a plaintiff is reduced by the

proportionate share of a settling co-defendant's percentage of responsibility. As the Court noted, "under the [proportionate share approach], no suits for contribution from the settling defendants are permitted." 114 S.Ct. at 1466.

Before this Court decided *McDermott*, the Eighth Circuit debated the three methods used to calculate settlement credits and also adopted the proportionate share approach. *Associated Electric*, 866 F.2d at 1271. Using the proportionate share method, the Eighth Circuit affirmed a district court's dismissal of a ship owner's claims against a settling co-defendant for reimbursement of maintenance and cure payments because such contribution claims were barred by the co-defendant's settlement. *Id.* at 1272. Significantly, although it predates *McDermott*, *Associated Electric* was decided under the same settlement principles this Court later embraced in *McDermott*--contribution from settling defendants is impermissible.

Faced with an identical situation in this case, the district court properly relied on *Associated Electric* and the proportional

share approach in dismissing Herndon's claims against Liberty, which had settled with the injured seamen, for reimbursement of maintenance and cure payments made to those seamen. The Fifth Circuit, however, while purporting to acknowledge the general rule against reimbursement from settling defendants, reversed the district court's order on the basis of its recent decision, *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994). *Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 39 F.3d 755, 759 (5th Cir. 1994)

In *Bertram*, the Fifth Circuit, facing the same question as in this case, expressly rejected *Associated Electric* and held that a ship owner's right to reimbursement from a co-defendant for maintenance and cure is not extinguished by that co-defendant's settlement with the plaintiff. 35 F.3d at 1017-18. In effect, for contribution claims for maintenance and cure, the Fifth Circuit adopted the *pro tanto* approach with contribution which this Court rejected in *McDermott*.

In *Bertram* and in this case, the Fifth Circuit's argument for

allowing contribution claims for maintenance and cure against a settling defendant was based on the distinction between a seaman's right to receive maintenance and cure payments from his employer and his right to recover general damages from any tortfeasor. *Bertram*, 35 F.3d at 1017. This "distinction" does not warrant abandonment of the general rule against seeking contribution from a settling defendant.

THE NATURE OF MAINTENANCE AND CURE

The right to maintenance and cure is "among the most pervasive incidents of the responsibility anciently imposed upon a ship owner." *Aguilar v. Standard Oil Co.*, 63 S.Ct. 930, 933 (1943). This Court held long ago that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of his ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *The Osceola*, 23 S.Ct. 483, 487 (1903). Accordingly, maintenance and cure has been described as a right given by general maritime

law to a seaman, injured in the service of his vessel, to "wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached." 2 M. J. Norris, THE LAW OF SEAMEN, § 26:2 (4th ed. 1985).

Additionally, the same incident that gives rise to an injured seaman's right to maintenance and cure from his employer may also give the injured seaman a right to pursue a claim for damages against his employer or a third-party tortfeasor or both. In the present case, the three seamen brought suit against both Herndon, their employer and ship owner, and against Liberty, a third party. These claims were founded upon theories of unseaworthiness or negligence or both. Further, "[i]n unseaworthiness and negligence cases the injured seaman is entitled to recover indemnity for loss of earnings, past and prospective; medical expenses reasonably incurred in the past and to be incurred in the future; and any additional sum for physical injuries and for pain and suffering." Norris, § 26:73. Therefore, a seaman's claim for damages may include elements in common with maintenance and

cure, which includes lost wages and medical expenses. Moreover, courts of appeals have expressly recognized that a seaman's damages in a suit for negligence may encompass elements in common with an award of maintenance and cure payments. *See, e.g., Colburn v. Bunge Towing*, 883 F.2d 372, 378 (5th. Cir. 1989) (award of cure was duplicative of the award for medical expenses); *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 404 (5th Cir. 1979) ("[T]he District Court on remand is entitled to consider as a fact the extent to which the prior jury award probably included amounts which are the substantial equivalent of maintenance and, if appropriate, cure, in order to eliminate the likelihood of a double recovery").

In this case, the seaman's claims against Liberty sought, among other elements of damages, recovery for lost wages and medical expenses. Herndon's maintenance and cure liability to the seamen also encompassed lost wages and medical expenses. Thus, Herndon's claims against Liberty are for reimbursement of lost wages and medical expenses paid to the crewmen in the form

of maintenance and cure. Therefore, even though Herndon was liable for maintenance and cure without regard to fault, Liberty's settlements with the crewmen included the settlement of claims for damage elements in common with Herndon's liability for maintenance and cure. Accordingly, as found by the *Associated Electric* court, the same maritime contribution rules applicable to claims based in tort should apply to claims for maintenance and cure.

THE NATURE OF HERNDON'S REIMBURSEMENT CLAIMS

Herndon's complaint against Liberty sought reimbursement of the amount paid in maintenance and cure in proportion to the percentage of fault found by the district court. It is clear that such a demand is a claim for contribution. *See* PROSSER & KEETON ON THE LAW OF TORTS § 50, at 336-41 (5th ed. 1984), *cited with approval in Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 829-30 (5th Cir. 1992) ("When a trial court applies contribution principles, it requires that each tortfeasor pay the proportion of

the damages attributable to its actions").

In addition, whether a seaman's right to maintenance and cure is independent of his right to compensatory damages does not affect the nature of Herndon's claims against Liberty. Thus, that Herndon's claims against Liberty are for contribution remains unchanged regardless of the character of the seamen's claims against Herndon. Therefore, because Herndon's claims against Liberty are for contribution, Herndon's claims are barred by Liberty's settlement with the crewmen.

CONCLUSION

Herndon's claims against Liberty--proportionate reimbursement of maintenance and cure payments--are contribution claims barred by Liberty's settlement with the crewmen aboard Herndon's vessel, and Herndon cannot present any set of facts which could alter this conclusion. Accordingly, the Fifth Circuit improperly reversed the district court's granting of Liberty's motion to dismiss for failure to state a claim. *See*

Conley, 78 S.Ct. at 102. Liberty requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

In the Matter of the Complaint of LIBERTY SEAFOOD, INC. As Owner of the F/V GLORIA B for Exoneration from and or Limitation of Liability.

LIBERTY SEAFOOD, INC., Appellee,

v.

HERNDON MARINE PRODUCTS, INC.,
Claimant - Appellant.

No. 93-7572.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM, JONES and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

One of the results of an allision, for which the crews of both vessels were found at fault, was that seamen were injured on one vessel and, therefore, received maintenance and cure; and the sole issue is whether the ship owner/employer who made those

payments has a right to reimbursement from the other shipowner for part of those payments, even though the latter settled with the seamen on their damages claims. Herndon Marine Products, Inc., appeals from the Rule 12(b)(6) dismissal of its claim against Liberty Seafood, Inc., for reimbursement of part of the maintenance and cure Herndon paid its employees. 1993 A.M.C. 2886. Our holding that Herndon has stated a claim is compelled by our very recent decision in *Bertram v. Freeport Moran, Inc.*, 35 F.3d 1008 (5th Cir. 1994). Accordingly, we REVERSE.

I.

In the Gulf of Mexico in 1991, Liberty's vessel drifted into Herndon's anchored vessel, causing damage to both and injury to the three seaman aboard Herndon's vessel. Because of the seamen's injuries, Herndon was required to pay them maintenance and cure.[1]

Liberty filed an exoneration and limitation action, pursuant

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[1] In response to Liberty's Rule 12(b)(6) motion to dismiss Herndon's maintenance and cure reimbursement claim, Herndon stated that it had paid approximately $105,000.

to 46 U.S.C.App. § 181 *et seq.*, and Rule F, Fed.R.Civ.P., Supplemental Rules for Certain Admiralty and Maritime Claims. In addition to responding to Liberty's claim, the injured Herndon seamen filed claims against Liberty for negligence and unseaworthiness; and Herndon filed claims against it for (1) indemnity and contribution for the maintenance and cure and for the costs of defending actions brought by the seamen, and (2) damages resulting from the loss of use of, and damage to, Herndon's vessel.

Prior to trial, Liberty settled with the three seamen and each of those claims was dismissed with prejudice. Pursuant to Fed.R.Civ.P. 12(b)(6) (failure to state a claim), Liberty then moved to dismiss Herndon's claims for indemnity and contribution, contending that Herndon could not claim contribution from Liberty, a joint tortfeasor, because Liberty had settled with the seamen. Herndon responded, *inter alia,* that the claim for recovery over against Liberty for maintenance and cure was separate and distinct from the settled claims with the seamen;

and that, therefore, the settlement bar rule was inapplicable.

The district court denied Liberty's limitation claim, but found the crews of both vessels at fault in the allision, apportioning 75% to Liberty and 25% to Herndon. No finding was made as to the percentage of fault, if any, attributable to each of the injured (and dismissed) seamen.

Thereafter, in ruling on Liberty's Rule 12(b)(6) motion concerning Herndon's maintenance and cure reimbursement claim, and because it did not feel there was controlling Fifth Circuit precedent, the district court looked to the Eighth Circuit's decision in *Associated Elec. Coop. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir.1991), and held that the policies favoring settlement dictated that Liberty's settlement should bar Herndon's claim. Accordingly, it granted the motion. Subsequently, Herndon and Liberty settled all other claims.

II.

As is well-established, we reviewed *de novo* the Rule 12(b)(6) dismissal, viewing all well-pleaded facts in the light most

favorable to Herndon. *E.g., Cinel v. Connick,* 15 F.3d 1338, 1341 (5th Cir.), *cert. denied,* ------U.S.------, 115 S.Ct. 189, ------L.Ed.2d------(1994). For the reasons stated hereinafter, Herndon has stated a claim.

Maintenance and cure are maritime terms describing a seaman's right to receive food and lodging (maintenance) and necessary medical services (cure). *E.g., Davis v. Odeco, Inc.,* 18 F.3d 1237, 1245 (5th Cir.), *cert. denied,* ------U.S.------, 115 S.Ct. 78, ------L.Ed.2d------ (1994). It is firmly established in this circuit that a shipowner required to pay maintenance and cure may recover those payments from a third-party who caused, in whole or in part, the employee's injury. *See Bertram*; *see also, Adams v. Texaco, Inc.,* 640 F.2d 618 (5th Cir.1981); *Savoie v. Lafourche Boat Rentals, Inc.,* 627 F.2d 722 (5th Cir.1980); *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.,* 410 F.2d 178 (5th Cir.1969). This right is not extinguished where, as in this case, the shipowner is apportioned part of the fault. Rather, that shipowner remains entitled to contribution from the

third-party tortfeasor in proportion to the third-party's fault. *Adams*, 640 F.2d at 620-21.

Accordingly, but for Liberty's settlement with the seaman, there would have been no dispute that Herndon had a right to reimbursement of part of the maintenance an cure. At issue is the effect, *vel non*, that the settlement has on that right.

Liberty notes correctly this circuit's general rule against claims for contribution by non-settling tortfeasors against settling tortfeasors. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5th Circ.1992). However, in *Bertram*, our court distinguished the traditional joint tortfeasor settlement case from maintenance and cure reimbursement claims, and held that a settlement by a third-party tortfeasor with an injured seaman does not bar a claim by the seaman's employer for recovery over against that tortfeasor for maintenance and cure.

In *Bertram*, an employee of Energy Catering Services was injured on a drilling platform while returning to the barge on which he worked. Houma was a contractor on the platform,

which was owned by Freeport. The employee's several claims included one against his employer, Energy, for maintenance and cure, and one against Freeport and Houma for negligence. Prior to trial, the employee settled with all parties, leaving, *inter alia*, Energy's cross-claims against Freeport and Houma for maintenance and cure reimbursement. The district court found Energy to be without fault, and apportioned fault for Houma at 20%, Freeport at 20% and the employee at 60%. It ordered Houma and Freeport to each reimburse Energy 50% of the maintenance and cure, not just their portion of fault (20% each). Houma appealed, contending, *inter alia*, that its settlement with Bertram should have barred recovery over by Energy for maintenance and cure.[2]

In affirming, we held that *Adams* (1981) and *Savoie* (1980) were still binding precedent, notwithstanding the modern trend

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[2] One of the other issues was whether Houma was required to pay 50% of the maintenance and cure, even though it was only 20% at fault. Bound by precedent concerning an innocent (without fault) employer, we held that it was. *Savoie*, F.2d at 724.

toward proportional fault. Therefore, we reaffirmed that an employer's claim for recovery over for maintenance and cure is separate for damages. *Bertram,* 35 F.3d at 1017-18. Accordingly, we concluded that the general involve maintenance and cure, was not applicable. *Id.* At 1015. Similarly, we concluded that the Eighth Circuit's opinion in *Associated Electric,* although dealing with a reimbursement claim for maintenance and cure payments, missed

> the critical distinction -- long recognized in this circuit -- between an employer's right to recover maintenance and cure payments, and one tortfeasor's right to recover some or all of a damage award assessed against it from another tortfeasor.

Id. at 1017.

As is well known, maritime law provides two separate lines of recovery for an injured seaman: damages, and maintenance and cure. The seaman may claim maintenance and

cure only from its employer; but, as noted, the employer may recover all, or a portion, of those payments from a third-party tortfeasor. *See Adams*, 640 F.2d at 620-21 (allowing recovery of proportionate share when employer partially at fault); *Savoie*, 627 F.2d at 724 (allowing total recovery when employer not at fault). The obligation of an employer not to pay maintenance and cure, which is based on its employment relationship with the seaman, exists regardless of the fault, *vel non*, of the employer. *E.g., Aguilar v. Standard Oil Co. Of New Jersey*, 318 U.S. 724, 730, 63 S.Ct. 930, 934, 87 L.Ed. 1107 (1943); *Bertram*, 35 F.3d at 1012-13; *Brister v. A.W.I., Inc.*, 946 F.2d 350, 361 (5th Cir. 1991).

As noted, in addition to maintenance and cure an injured seaman may also seek damages for negligence and unseaworthiness. *E.g. Cooper v. Diamond M Co.*, 799 F.2d 176, 179 (5th Cir.1986), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834 (1987). The damage claim may be brought against the employer and a third-party tortfeasor. In turn, through

indemnity or contribution, the employer may recover from the third-party tortfeasor for part or all of any damages assessed against the employer. *See, Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 499-500 (5th Cir.1982). Thus, in a maritime collision, a third-party tortfeasor faces two distinct claims by a shipowner for contribution or indemnity: (1) for damages assessed against the shipowner; and (2) for maintenance and cure. As stated, *Bertram* holds that a settlement by a third-party with an injured seaman on the damage claim will not bar the shipowner's recovery of maintenance and cure.

The holding in *Bertram* controls here, even though Herndon, unlike the employer in *Bertram*, was found partially at fault. As noted, our court held in *Adams* that the partial fault of the shipowner does not preclude recovery for maintenance and cure from a joint tortfeasor for its portion of the fault. Because Herndon and Liberty were found 25% and 75% at fault, respectively, Herndon has a claim against Liberty for 75% of the

maintenance and cure.[3] *See Bertram*, 35 F.3d at 1020-21.

Finally, as to any concern over the policy of favoring settlements, once it is recognized that Liberty in fact had two separate grounds of liability to the shipowner/employer, it becomes clear that settlement policy is not implicated. Liberty cannot extinguish its maintenance and cure liability to Herndon (a separate and independent claim) by settling a separate and unrelated claim with the injured seamen. As discussed in *Bertram*, 35 F.3d at 1016-17, public policy favoring settlements should be advanced by *Bertram's* holding, because settlement of all damages and maintenance and cure claims will be fostered, resulting in the possible termination of all claims, and, hence, the litigation.

III.

For the foregoing reasons the judgment of the district court

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[3] As noted, in the limitation action, the district court found the crews of both vessels at fault. Liberty's crew was found 75% at fault for, among other things, failing to properly anchor and control their vessel. Herndon's crew was found 25% at fault for failing to keep a proper lookout.

is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

IN THE MATTER OF THE COMPLAINT OF LIBERTY SEAFOOD, INC.AS OWNER OF TH F/V *GLORIA B* FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY

United States District Court, Southern District of Texas
(Galveston Division),
August 12, 1993
No. G-92-399

HUGH GIBSON, D.J.:

Before the Court is complainant Liberty Seafood, Inc.'s opposed Motion to Dismiss Contribution and Indemnity Claims of Claimant Herndon Marine Products, Inc. The parties have submitted briefs for the Court's consideration. No factual disputes relevant to ruling on this motion have been raised. The sole issue presented is whether a vessel owner, partially at fault for causing injury to an employee-seaman, can seek reimbursement for maintenance and cure payments disbursed to the injured seaman from a joint tortfeasor who has settled with the seaman.

Background

On the afternoon of March 3, 1991 two shrimp boats, the F/V *Gloria B* and the F/V *Gulf King 31*, collided in the Gulf of

Mexico. Both vessels sustained hull damage. Manual Rodriguez, Don Gullick and Frank Patton, the three crewmembers aboard the *Gulf King 31*, alleged personal injuries. No injuries were reported aboard the *Gloria B*. At all relevant times the *Gloria B* was owned and operated by complainant Liberty Seafood, Inc. and the *Gulf King 31* was owned and operated by claimant Herndon Marine Products, Inc.

Liberty Seafood petitioned the Court for exoneration from and/or limitation of liability on August 14, 1992. A trial on issues relating to the complainant's entitlement to limitations of liability was held to the Court on June 23, 1993. The Court found that Liberty Seafood's petition for limitation of liability was not timely filed and the application to limit liability was denied. The court also apportioned fault for the collision: The *Gloria B*, 75%; the *Gulf King 31*, 25%.

The three injured *Gulf King 31* crew members settled their claims against Liberty Seafood prior to trial. In consideration for their releases Rodriguez received $4,000, Gullick received

$45,000 and Patton received $10,000.

Herndon Marine claims it has paid in excess of $32,000 for maintenance and in excess of $73,000 for cure to the three personal injury claimants. Herndon seeks recovery on a negligence theory from Liberty Seafood for amounts of maintenance and cure paid. Liberty Seafood contends that the "settlement bar" rule precludes such recovery.

Discussion

In admiralty, losses generally are apportioned among joint tortfeasors according to their comparative degree of fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 1979 AMC 1167 (1979). In the Fifth Circuit, the scope of the proportional fault approach has been extended to encompass maintenance and cure payments. *Adams v. Texaco, Inc.*, 1982 AMC 1004, 1006-07, 640 F.2d 618, 620-21 (5 Cir.1981). Even when a shipowner's negligence has contributed to causing the seaman's injury, the shipowner is entitled to

contribution for maintenance and cure from a third-party tortfeasor whose negligence also contributed to causing the injury. *Id.*

Apportionment of loss is different if the claimant has agreed to settle with one of the joint tortfeasors. A strong policy encouraging settlement of disputes has led to the adoption of the "settlement bar" rule in this and most other circuits. *See, e.g., Leger v. Drilling Well Control, Inc.* 1980 AMC 288, 592 F.2d 1246 (5 Cir.1979); *Hernandez v. M/V Rajaan,* 1989 AMC 523, 841 F.2d 582 (5 Cir.), *cert. denied,* 488 U.S. 981, 1989 AMC 2405 (1988). *Cf. Great Lakes Dredge & Dock Co. v. Miller,* 1992 AMAC 2310, 2324, 957 F.2d 1575, 1584 (11 Cir.), *cert. denied,* 506 U.S. ---, 113 S.Ct. 484 (1992) (rejecting both the settlement bar and "settler barred" rules in maritime actions). In the Fifth Circuit, contribution cannot be obtained by one joint tortfeasor from another joint tortfeasor who has settled and has been released by the claimant. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5 Cir.1992).

Herndon Marine contends the settlement bar rule is inappropriate when a party seeks recovery for maintenance and cure paid to an injured employee. Herndon argues that the obligation to provide maintenance and cure is distinct and separate from the liability imposed by tort law, and thus the maintenance and cure recovery should not be barred by settlement of the tort cause.

An injured seaman's right to maintenance and cure payments runs only against a ship, *in rem*, and the shipowner or employer, *in personam*. Injured seamen are entitled to receive maintenance and cure payments from their employers without respect to fault. *See, e.g., Couts v. Erickson,* 1957 AMC 515, 241 F.2d 499 (5 Cir.1957); *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259 (5 Cir. 1987). Because only the shipowner has an obligation to provide maintenance and cure, Herndon argues, an action for recoupment of such payments is independent of the tort action settlement between the seaman and joint tortfeasor.

In situations not involving seamen, provisions for pursuing

recovery of payments made to employees injured while on the job usually are included in the applicable workers' compensation statute. *See, e.g., Ray v. Lykes Bros. Steamship Co.*, 805 F.2d 552 (5 Cir.1986) (discussing prosecution of claims under the LHWCA). No such statutory guidance exist when the injured employee is a vessel crew member.

Herndon Marine cites several Fifth Circuit cases where claims for recoupment of maintenance and cure were allowed. *See Savoi v. Lafourche Boat Rentals, Inc.*, 1982 AMC 579, 627 F.2d 722 (5 Cir. 1980); *Wisconsin Barge Line, Inc. V. The Barge Chem 300*, 1980 AMC 1514, 546 F.2d 1125 (5 Cir.1977); *Adams, supra.* None of the cases, however, implicate the public policy in favor of encouraging settlements.

The Fifth Circuit has not squarely addressed the issue of whether a settlement bar exist for claims seeking to recoup maintenance and cure payments from a settling tortfeasor. However, the Eighth Circuit confronted the issue in *Associated Electric Coop. v. Mid-American Transp. Co.*, 1991 AMC 1839,

931 F.2d 1266 (8 Cir.1991). After examining the various rules for apportioning damages when a joint tortfeasor settles with the claimant, the court concluded that a vessel owner's claim for maintenance and cure payments is a claim for indemnity or contribution and therefore is barred by the same proportional fault approach applicable to the vessel owner's other claims for indemnity or contribution. *Associated*, 1991 AMC at 1847, 931 F.2d at 1272.

The Eighth Circuit's reasoning is persuasive. Denial of the settlement bar in situations such as that presented in the instant case would interfere with policies favoring settlement.

No evidence of bad faith settlement has been presented. After considering the total value of the plaintiff's claim, the relative fault of the settling defendant, and the monetary value of the settlement, the Court has no reason to suspect a bad faith settlement. Therefore, it is ordered that Complainant Liberty Seafood, Inc.'s Motion to Dismiss Contribution and Indemnity Claims of Claimant Herndon Marine Products, Inc. is granted.

Hugh Thomas BERTRAM, Plaintiff,

v.

FREEPORT McMORAN, INC.,
et al., Defendants.

HOUMA INDUSTRIES, INC.,
Defendant-Appellant,

v.

ENERGY CATERING SERVICES, INC.,
Defendant-Appellee.

No. 93-7575.

United States Court of Appeals,
Fifth Circuit.

Oct. 7, 1994

Appeal for the United States District Court for the Southern District of Texas.

Before, POLITZ, Chief Judge, and DUHE and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Primarily in issue are (1) whether an employer's right to be reimbursed by third-party tortfeasors for maintenance and cure

paid by the employer to its injured employee is barred by the employee's pre-trial settlements with the third-party; and , (2) in that the employer was not assigned fault, but the employee was, resulting in the third-party tortfeasors' apportioned fault totaling less than 100%, whether the maintenance and cure should be reimbursed totally by the third-party tortfeasors, or whether, instead, each should reimburse only according to its apportioned fault, resulting in less than full reimbursement.

Energy Catering Services, Inc., paid maintenance and cure for its employee, Hugh Thomas Bertram, as a result of an accident for which no fault was assigned Energy, Bertram was found 60% at fault, and Houma Industries, Inc., and another third-party were each apportioned 20% of the fault. Before trial, Bertram settled with Energy and Houma, and the other tortfeasor. Houma contests having to reimburse Energy for the maintenance and cure, primarily because of a claimed settlement bar which it asserts springs, in part, from the modern trend in admiralty of apportioning fault. And, as one of its alternative bases for

challenging the judgment, Houma maintains, again seeking shelter under that trend, that it should not have to reimburse 50% of the maintenance and cure, because it was apportioned only 20% of the fault. We AFFIRM.

I.

Bertram, an Energy employee, was assigned to work aboard a drilling barge owned by Offshore Pipelines, Inc. (OPI). The vessel was anchored next to a fixed oil and gas platform owned by Freeport-McMoran, Inc., and Freeport-McMoran Oil & Gas Co. (Collectively, Freeport) and located on the Outer Continental Shelf off the coast of Louisiana. Houma Industries, Inc., was a contractor on the platform. In November 1990, while returning to the barge from the platform, Bertram was injured on the platform by a falling ladder, which Houma's employees had used and had been directed to secure.

Bertram sued under the Jones Act and general maritime law, seeking recovery from Energy for maintenance and cure; and from Energy and OPI for negligence and unseaworthiness. He

later added negligence claims against Freeport and Houma. Energy cross-claimed against Houma and Freeport for contribution or indemnity; they did likewise against Energy.

Prior to trial, Bertram settled with all defendants: OPI (shipowner), Freeport (platform owner), Houma (platform contractor), and Energy (employer). Therefore, only the cross-claims remained: Energy's against Houma and Freeport for maintenance and cure reimbursement; theirs against Energy for indemnity or contribution.

In July 1993, the district court ruled in favor of Energy.[1] It found Energy without fault for Bertram's injuries, and apportioned fault as follows: Bertram, 60%; Houma and Freeport, each 20%. But, by an amended judgment, and although Houma and Freeport had each been found only 20% at fault, each was required to reimburse Energy for 50% of the approximately $143,000 paid for maintenance and cure. Only Houma appeals.

II.

Maintenance and cure is a seaman's right under general

maritime law to receive a "per diem living allowance for food and lodging [maintenance] and . . . payment for medical, therapeutic and hospital expenses [cure]". Black's Law Dictionary 954 (6th ed. 1991); *Davis v. Odeco*, 18 F.3d 1237, 1245-46 (5th Cir.), *petition for cert. filed*, 62 U.S.L.W. 3863 (U.S. June 10, 1994) (No. 93-1986). A shipowner must pay maintenance and cure to any seaman who "becomes ill or suffers an injury while in the service of a vessel", regardless of whether either party was negligent. 1B Ellen M. Flynn et al., Benedict on Admiralty § 42, at 4-5 (7th ed. 1993) (hereinafter cited as Benedict); *see also* Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 Fordham Int'l L.J. 669 (1991). The right terminates only when "maximum cure has been obtained." 1B Benedict § 51, at 4-73 (footnote omitted).[2]

Houma asserts that the district court erred (1) by holding that Energy's maintenance and cure reimbursement cross-claim survived Bertram's pre-trial settlements with all defendants; (2) by granting Energy recovery of the total medical cost it paid; (3)

by finding Houma at fault; and (4) by requiring Houma to pay 50% of the maintenance and cure, rather than 20% (its apportioned fault). Needless to say, findings of fact are reviewed only for clear error, Fed.R.Civ.P. 52(a); *e.g., Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); conclusions of law are reviewed freely. *E.g. Salve Regina College v. Russell,* 499 U.S. 225, 231, 111 S.Ct.1217, 1221, 113 L.Ed.2d 190 (1991).

A.

Whether Energy's maintenance and cure reimbursement claim against Houma was barred by Bertram's pre-trial settlements with all defendants is a legal issue, reviewed freely, that touches upon the trend in maritime law of apportioning fault. In essence, Houma contends that Fifth Circuit precedent on maintenance and cure reimbursement, especially *Savoie v. Lafourche Boat Rentals, Inc.*, 627 F.2d 722 (5th Cir. Unit A 1980) (employer without fault), and *Adams v. Texaco Inc.*, 640 F.2d 618 (5th Cir.1981) (employer partly at fault), no longer

control. This is addressed best by first retracing, in considerable detail, the steps that led to recovery over against a third-party tortfeasor for maintenance and cure.[3]

1.

As reflected in the earlier brief discussion of maintenance and cure, the district court stated correctly that Energy, as Bertram's employer, owed him "an absolute non-delegable duty" to provide maintenance and cure, regardless of Bertram's being at fault, and Energy being blameless. *E.g. Davis v. Odeco,* 18 F.3d at 1246 (owner of vessel has a duty to pay maintenance and cure which is unrelated to any duty of care under tort law") (citing *Adams*, 640 F.2d at 620).

> A seaman's right to maintenance and cure is implied in the employment contract between the seaman and shipowner. It "in no sense is predicated on the fault or negligence of the shipowner." Thus, an owner of a vessel is almost automatically liable [for maintenance and cure].

Brister v. A.W.I., Inc., 946 F.2d 350, 360 (5th Cir.1991) (footnote and internal citations omitted; quoting *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 730, 63 S.Ct. 930, 934, 87 L.Ed. 1107 (1943)). In addition, the seaman's right to receive, and the shipowner's duty to pay, maintenance and cure is independent of any other source of recovery for the seaman (*e.g.*, recovery for Jones Act claims). *Brister*, 946 F.2d at 361.

Although a seaman's negligence does not negate a shipowner's duty to pay maintenance and cure, the shipowner may recover those payments from a third-party whose negligence partially or wholly caused the seaman's injury. *E.g., Savoie*, 627 F.2d at 723 (even where seaman was partially responsible, it was "well-established" that employer may recover maintenance and cure costs) (citing *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 186 (5th Cir.1969)).

Our cases allowing such a recovery follow the holding of the landmark decision in *Jones v. Waterman S.S. Corp.*, 155 F.2d 992, 997-1001 (3d Cir.1946). There, a seaman employed by

Waterman was walking across the pier near his ship and fell into a ditch along a railroad siding owned by Reading. *Id.* at 994. He sued Reading, recovered damages from it, and executed a release in favor of it. *Id.* Thereafter, when the seaman sued Waterman for maintenance, cure, and wages, Waterman impleaded Reading for indemnity for any recovery by the seaman. *Id.* at 995.

The district court held that, the seaman having received a judgment against Reading, he could not maintain the action against Waterman, because a second judgment for the seaman could be a double recovery. *Id.* And, it refused to permit Waterman's cross claim against Reading, on the theory set out in *The Federal No. 2*, 21 F.2d 313 (2d Cir.1927) (because maintenance and cure stems from contract between seaman and employer, employer cannot recover over against a third-party tortfeasor, absent a contractual or other legal relationship between employer and tortfeasor).[4] *Id.* The Third Circuit reversed, finding *The Federal's* reasoning inapposite. *Waterman*, 155 F.2d

at 994, 1001.

In holding that the seaman could proceed against Waterman, and that Waterman could seek recovery over against Reading, the third Circuit distinguished the seaman's claims against Reading for damages (sounding in tort), from his claims against Waterman for maintenance, cure, and lost wages (sounding in contract), stating:

> [The seaman] could not have recovered maintenance and cure and wages from Reading, nor may he recover damages from Waterman. It follows that Waterman and Reading were not joint tortfeasors. In fact, Waterman committed no tort. It is not alleged that it did. Under no theory of law can [the seaman's] release to Reading release Waterman.

Id. At 996.

As for Waterman's claim against Reading, the court held:

> It would seem to follow. . .as a matter of logic

> that if the master by virtue of his contract. . .with the servant is compelled to maintain and cure his servant. . .the master should be permitted to recover these sums from the wrongdoer. . . .

Id. At 999 (footnote omitted). In so holding, *Waterman* relied in part on Pennsylvania Law (holding that an employer has a right to recover against a tortfeasor for an act depriving the employer of the employee's services). *Id.* at 1000-01. And, it also described Waterman's right against Reading as being derived from the breach of Reading's implied warranty of maintaining the railroad track "in a safe condition for the benefit of seamen leaving a ship moored to the pier" with which ship it had a contract. *Id.* At 999-1000.

Houma asserts that *Waterman* is inapplicable, claiming that it was based on Pennsylvania law, whereas this case falls under general maritime law; and because here, there was no contract between Houma and Energy. But, this argument was rejected in our circuit long ago. In following the *Waterman* rule (employers

may seek reimbursement of maintenance and cure from third-party tortfeasors), we need not rely on either state law or a contract, implied or express, between the shipowner and tortfeasor. Rather,

> [we] do not view the rationale of *Waterman* as limited to cases in which Pennsylvania law controls. Other courts likewise have viewed the *Waterman* case as standing for a broader rule. See, e.g., [*United States v. The Tug Manzanillo,* 190 F.Supp. 229, 232-33 (D.Or.1960), *rev'd on other grounds,* 310 F.2d 220 (9th Cir.1962)]. [We] similarly find unconvincing any contention that the *Waterman* case suggests that its rationale is not limited to such situations.

Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Auth. 284 F. Supp. 709, 714-15 n.7 (E.D.La.1968) (Rubin District Judge) (ferry authority could recover for maintenance and cure costs; its employee was injured by passenger's negligence);

Compare Gauther v. Crosby Marine Serv.,Inc., 752 F.2d 1085, 1089-91 (5th Cir.1985) where Louisiana law, rather than maritime law, applied because tort occurred on shore, seaman's contributory negligence was attributed to employer, thereby barring employer's indemnity action).

Indeed, our court has applied the *Waterman* rule in a number of cases not involving state law claims, and has allowed an employers recovery over against a tortfeasor of maintenance and cure. *E.g. Adams*, 640 F.2d at 620-21; *Savoie*, as in this case, the employer was without fault ("innocent").

"Indemnification of the innocent employer is based on the common sense principle that a party whose neglect has caused or contributed to the need for maintenance and cure payments should reimburse the cost of those payments. . . ." *Savoie*, 627 f.2d at 723 (citing and quoting *Tri-State Oil*, 410 F.2d at 186), *cited in Adams*, 640 F.2d at 620-21; *accord, Black v. Red Star Towing & Transp. Co., Inc.*, 860 F.2d 30, 32-34 (2d Cir.19888) (en banc) (overruling *The Federal No. 2*, 21 F.2d 313 (2d Cir.1927), and

citing *Adams* and *Savoie*). *See* 1 Schoenbaum, § 6-35, at 369 & nn. 1-2 (citing and discussing, *inter alia, Waterman, Adams*, and *Savoie*; "employer who pays maintenance and cure to a seaman has a right to complete indemnity from an independent tortfeasor whose fault or negligence was the sole cause of the injury"). "[I]mposition of liability on the tortfeasor. . .is not too 'indirect' a consequence of his negligence to allow recovery. The shipowner's obligation--imposed by the law itself--is not so unforeseeable by a tortfeasor as to bar recovery." *Adams*, 640 F.2d at 620 & n.2 (brackets in *Adams*) (citing Grant Gilmore and Charles L. Black, *The Law of Admiralty* § 6-14 (2d ed. 1975) (hereinafter cited as Gilmore and Black); *Richardson*, 284 F.Supp. At 716).

2.

Therefore, as the district court recognized, *Adams* and *Savoie* seem to permit Energy to be reimbursed for its maintenance and cure cost. But, as noted, the key basis for Houma's challenge to reimbursing Energy lies in two additional

factors: first, Bertram settled with all defendants prior to trial; and second, our court has joined the modern trend toward proportional or comparative fault for maritime cases. *See United States v. Reliable Transfer,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), *discussed and followed in, e.g., Hardy v. Gulf Oil Corp.,* 949 F.2d 826, 833-36 (5th Cir.1992) (applying proportional fault rules, rather than tort indemnity theories, to maritime cases); *Loose v. Offshore Navigation, Inc.,* 670 F.2d 493, 501 (5th Cir.1982). (As stated, the portion fault trend is also an element of Houma's challenge, as discussed in part II.D., to reimbursing 50% of the maintenance and cure, as opposed to its being only allocated 20% of the fault.)

The contention that Bertram's pre-trial settlements barred Energy's claim is based primarily on *Hardy*, 949 F.2d at 835-36 which did not concern maintenance and cure. Hardy was employed by a contractor for ZAGOC; ZAGOC contracted also with BOS, upon whose barge Hardy was injured. Hardy sued, *inter alia,* BOS and ZAGOC, asserting claims under the Jones Act

and general maritime law. ZAGOC and BOS cross-claimed against each other: ZAGOC contended that its contract with BOS required BOS to indemnify it for any damages awarded to Hardy; BOS sought indemnification or contribution. 949 F.2d at 829.

Prior to trial, Hardy settled with ZAGOC, agreeing to indemnify it for any contribution claim asserted against ZAGOC, except for BOS's claim against ZAGOC. The jury found that BOS's negligence and the unseaworthiness of its barge were the sole causes of Hardy's injuries; and that ZAGOC had no responsibility to either indemnify BOS or contribute to the damages for which BOS was liable. *Id.* While its appeal was pending, BOS settled with Hardy, leaving in issue only BOS's claim against ZAGOC. *Id.* at 828, 829. Among other things, our court concluded that the advent of the proportional fault theories had limited the ability of a defendant who settled with the plaintiff after trial to recover, either through indemnity or contribution, from a defendant who had settled before trial. *Id.* at 833-36.

At bottom, Houma's contention misapprehends the parties'

relationships to one another, and the nature of Energy's cross-claim. Energy's maintenance and cure obligation arises as a matter of law, through its relationship with Bertram and despite its being without fault. *E.g.*, 1B Benedict, § 42, at 4-5 to 4-6 (7th ed. 1993) (neither seaman's nor employer's negligence is to be considered); Gilmore and Black § 6-6, at 281 (comparing shipowner's liability for maintenance and cure to worker's compensation; both are independent of fault and based on employment relationship).

Second, again in contrast to *Hardy*, Energy's claim against Houma is *not* for recovery over for "the amount of damages [Energy] owes the plaintiff", *i.e.*, Bertram. *Hardy*, 949 F.2d at 836 (emphasis added). Rather, it is for reimbursement of maintenance and cure; and that claim is "not a derivative right through [Bertram,] but [wa]s a separate and distinct cause of action which [vested] in [Energy] when it [wa]s ascertained what sum of money [wa]s due" from Energy to Bertram. *Waterman*, 155 F.2d at 1001; *accord*, *United States v. Tug Manzanillo*, 310

F.2d 220-222 (9th Cir.1962) (employer's right to recover maintenance and cure from tortfeasor accrued "the moment the [employer] paid these sums" to seaman, regardless of release between seaman and tortfeasor).

Nor could the settlements between Bertram and the defendants release one defendant from an independent claim asserted by another. In this regard, Bertram's settlements with Energy and Houma are immaterial; there has been no settlement between Houma and Energy. The Ninth Circuit reached the same result in *Tug Manzanillo*, 310 F.2d at 221, where the tortfeasor contended (as does Houma) that maintenance and cure costs were damages subsumed in its settlement with the plaintiff.

The Ninth Circuit held that a settlement between the injured seaman and the tortfeasor did not bar a claim for indemnity for maintenance and cure by the employer against the tortfeasor:

> To hold that by paying certain sums to [the employee] . . . [the tortfeasor] had thereby

> discarded its then existing liability to the [employer], is wholly impermissible conclusion. If A is indebted to B he cannot discharge that indebtedness by payment to C.

Tug Manzanillo, 310 F.2d at 222. Similarly, a release between Energy and Bertram, or Houma and Bertram, cannot bar Energy's maintenance and cure reimbursement claim against Houma.

In support of its contention that Energy cannot recover over for maintenance and cure, Houma relies also upon *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir.1991). Unlike *Hardy, Associated Electric* does involve reimbursement for maintenance and cure. 931 F.2d at 1271-73 (citing *Adams* and *Savoie*). In *Associated Electric*, Teasley, and employee of AEC, was injured while working aboard a barge owned by MATCO. *Id.* at 1267-68. AEC claimed that MATCO was solely at fault; MATCO, that AEC was negligent. *Id.* at 1268.

AEC paid Teasley maintenance and cure, but did not settle

his possible damages claims. *Id.* AEC sought recovery over against MATCO for maintenance and cure (similar to claim by Energy), in addition to claims for other possible damages. *Id.* The district court dismissed those claims, and approved the MATCO/Teasley settlement; AEC appealed *Id.*

For the damages claims, the Eighth Circuit held that maritime law barred a nonsettling defendant from seeking indemnity or contribution from a settling defendant. *Id.* at 1269-71 (citing cases, and discussing circuit split). Likewise, it held that AEC's cross-claim for maintenance and cure was barred by the MATCO/Teasley settlement, rejecting AEC's contention that, even if that settlement barred its damages claims, it "d[id] not affect [AEC']s right to be reimbursed for maintenance and cure payments. . .because such rights are completely independent from Teasley's damages." *Id.* at 1271. Citing *Adams* and *Savoie*, the court stated:

> We reject AEC's argument for two reasons. First, none of the cases cited by AEC involved an

indemnity suit by a non-settling defendant against a settling defendant. Thus, such cases do not implicate the public policy in favor of encouraging settlements. Second the common law cases cited by AEC refer to the employer's action for maintenance and cure payments as suits for indemnity or contribution, rather than as wholly independent action. *See Adams*, 640 F.2d at 620 ("The issue, then, becomes. . . whether [the settling tortfeasor] can secure *contribution* for the maintenance and cure payments made necessary through both [the other tortfeasor's] and its own negligence") (emphasis added); *Savoie*, 627 F.2d at 723 (applying rule that "an innocent employer is entitled to *indemnification* from a negligent third party for payments made to an employee injured as a result of the third party's negligence") (emphasis added). Admittedly, MATCO's own pleading

> characterized AEC's claim for maintenance and cure payments as one for "damages". However, we interpret these admissions as generic descriptions applicable even to indemnity and contribution claims.
>
> Accordingly, we hold that AEC's claim for maintenance and cure payments is a claim for indemnity or contribution, and is therefore barred by the same proportional fault approach applicable to AEC's other clams for indemnity or contribution.

Id. at 1271-72 (brackets and italics in original).

Notwithstanding the foregoing, *Adams* and *Savoie* remain controlling precedent in this circuit. "[O]ne panel may not overrule the decision, right or wrong, of a prior panel in the absence of en banc reconsideration or superseding decision of the Supreme Court." *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1393 & n. 15 (5th Cir.1992) (internal quotation marks and

citations omitted). Neither has happened. We do not read the decisions by the Supreme Court as having superseded either decision. Therefore, an employer's right to recovery over for maintenance and cure is not negated by a settlement by the injured employee with the third party tortfeasor.

Despite being bound by *Adams* and *Savoie*, we turn to the concerns expressed in *Associated Electric*, in order to demonstrate the continuing vitality of *Adams* and *Savoie*, on this issue. Contrary to the concern expressed in *Associated Electric*, this does not frustrate "the public policy in favor of encouraging settlements". 931 F.2d at 1272. A settling third-party tortfeasor should obviously, be aware of the employer's maintenance and cure payments (Houma certainly was), and, in settling with the employee, should take into account the possibility of being required to reimburse the employer for those payments. This should prompt the employee, employer, and third-party tortfeasor to work together to reach settlement of all claims, and thus avoid any further litigation. Certainly this is even more consistent with

the public policy in favor of settlements.[5]

Associated Electric's second reason for barring the employer's maintenance and cure claim appears to be that, because the employer's claim against the third-party tortfeasor for recovery of maintenance and cure was labeled a claim for "indemnity or contribution", it was the same type of claim as the employer's claim for indemnity or contribution for the employee's general damages. Because the latter type of claim was barred by the third-party tortfeasor/employee settlement, the Eighth Circuit concluded that the former must also be barred. This analysis, however, much like Houma's argument detailed *supra*, appears to miss the critical distinction--long recognized in this circuit--between an employer's right to recover maintenance and cure payments, and one tortfeasor's right to recover some or all of a damage award assessed against it from another tortfeasor.

As note, the Eighth Circuit quoted *Savoie* and *Adams* in holding that claims for recovery of maintenance and cure were also labeled "claim[s] for indemnity or contribution, and . .

.therefore barred by the same" reasoning that barred claims for indemnity or contribution for other damages. *Associated Electric*, 931 F.2d at 1272. As discussed, however, the obligation to pay maintenance and cure differs from a tortfeasor's liability for damages--although a claim to recover either cost may be labeled one for indemnity or contribution. *E.g., Ray v. Lykes Bros. Steamship Co., Inc.*, 805 F.2d 552, 554 (5th Cir.1986), *cited in Associated Electric*, 931 F.2d at 1271. As the employer urged in *Associated Electric*, an employee's right to receive, and an employers right to be reimbursed, maintenance and cure are rights "completely independent from [the seaman's] damages." *Id.* at 1271 (citing *Ray*). *Savoie* and *Adams* are certainly not to the contrary.

In sum, we hold, as did the district court, that Energy's claim is not barred by Bertram's pre-trial settlements. *Savoie*, 627 F.2d at 723, 724 (even when employee has "relinquished his other claims" against employer after receiving maintenance and cure, employer may recover for maintenance and cure cost from

third-party found to have caused employee's injury); *accord*, *Great Lakes Dredge & Dock Co., v. The Tanker Robert Watt Miller*, 957 F.2d 1575, 1581-84 (11th Cir.) (Not maintenance and cure case; rejecting "settlement bar" rule of *Associated Electric* and other cases; citing *Savoie*), *cert. denied*, ---U.S.----, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992); *Wisconsin Barge Line, Inc. v. The Barge Chem 301*, 390 F.Supp. 1388, 1390, 1393-94 (M.D.La.1975) (employer who voluntarily settled damages claims may not recover for damages from third-party tortfeasor, but is entitled to indemnity for maintenance and cure; unlike non-compulsory damages settlement, maintenance and cure payment is involuntary and therefore recoverable), *rev'd on other grounds*, 546 F.2d 1125 (5th Cir.1977) (remanded for determination whether settlement amount was reasonable).

B.

Houma challenges the amount of cure paid Bertram, asserting that there was

> no evidence of the reasonableness of the [medical]

> costs for which Energy now seeks reimbursement. Accordingly, there is not a finding by the Court that the costs were reasonable. Therefore it was erroneous for the court to award those costs.

(Footnote omitted.) In support, it states that "[t]here is evidence that the treatment rendered by [Bertram's physician] was unwarranted and unnecessary and is the root of Mr. Bertram's physical problem."

Although the district court found that Bertram's medical "treatment was reasonable and necessary for [his] recovery", it did not find expressly that the cost of that treatment was reasonable. It did state, however, that any finds of fact not expressly made were deemed to have been made in support of its judgment. And, the judgment awards Energy the maintenance and cure it paid.[6] Therefore, we consider the district court to have found implicitly that the amount paid for medical treatment was reasonable; we review that finding only for clear error. *See Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 727-28 (5th Cir.1980);

Fed.R.Civ.P. 52(a); *Tate v. American Tugs, Inc.*, 634 F.2d 869 (5th Cir. Unit A 1981) (determination of amount of maintenance is a fact question). A finding is clearly erroneous when, "although there is enough evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed and that the district court could not permissibly find as it did" *Noritake*, 627 F.2d at 728 (citations omitted).

Houma bases its challenge to the amount of cure on testimony (deposition) by its witness, Dr. Weiner, who considered the medical treatment "unwarranted and unnecessary and . . . the root of Mr. Bertram's physical problems". As Energy point out, however, Bertram's primary treating physician, Dr. Scheffey, testified (deposition) that the treatment was both reasonable and necessary. Dr. Scheffey based this on examinations of Bertram, Bertram's physical condition, and the fact that more conservative treatment failed to improve Bertram's condition. The court's decision to credit Scheffey's testimony, rather than Wiener's, is

not clearly erroneous. Accordingly, although the doctors were not asked whether Dr. Scheffey's fees were reasonable, we do not disturb the implicit finding that they were.

C.

Next, Houma contends that there is "no evidence that [it] was a cause of [Bertram's] accident" and injuries resulting from the falling ladder. The district court found that, for several days prior to the accident, Houma employees had used the ladder, but that they failed to stow or secure it properly. A Houma supervisor was asked to secure the ladder; and, although it was tied to a walkway grating, a post-accident investigation revealed that the rope securing it had been cut. Further, the district court found that the top of the ladder had never been properly secured. Based on these findings, *inter alia*, the district court apportioned 20% of the fault to Houma. (As noted, Freeport, which did not appeal, was also found 20% at fault.) But, because Bertram failed to use an alternative safer route (by which he could have avoided the ladder), and because it was "probable that a portion

of Mr. Bertram's life jacket caught a rung of the ladder, causing it to fall on. . .him", the district court apportioned 60% of the fault to Bertram. Houma disputes the findings that it owned the ladder and that it failed to stow or secure it; but it does not dispute that its workers used the ladder, or that they were directed to secure it.[7]

In admiralty cases, the district court's rulings on "negligence, causes, and proximate cause are findings of fact". *E.g. Gavagan v. United States,* 955 F.2d 1016, 1019 (5th Cir.1992) (citing cases, including *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir.) ("Question of negligence and causation in admiralty cases are treated as fact questions. . . .) *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988)). Again, such findings are upheld unless, reviewing the record as a whole, we are "'left with the definite and firm conviction that a mistake has been committed'". *Id.* (quoting *Noritake,* 627 F.2d at 728).

Freeport employees testified that Houma brought the

ladder to the platform. The record contains ample evidence that the ladder was used by Houma; that on several occasions, Freeport employees asked Houma's supervisor to secure it; and that it was not properly secured or stowed on the evening of the accident. Therefore, the findings that Houma failed to stow the ladder properly, and assigned it 20% of the fault are not clearly erroneous.[8]

D.

As discussed, consistent with the foregoing apportionment of fault, and relying upon *Adams* (employer partly at fault), the district court entered judgment that Freeport and Houma each reimburse Energy for 20% of the maintenance and cure; but, on Energy's motion, and in reliance on *Savoie* (employer without fault), the judgment was amended to require each to instead reimburse Energy for 50% of the maintenance and cure. Houma asserts alternatively that, consistent with its apportioned fault, it should be required to reimburse Energy for only 20% of the maintenance and cure. This contention turns on our relatively

recent adoption, discussed *supra*, of proportional fault. *See McDermott, Inc. v. AmClyde*, ---U.S.---, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994); *Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251; *Loose*, 670 F.2d at 500-01; *compare Savoie*, 627 F.2d 722 (not discussing *Reliable Transfer* proportional fault concepts); *see also Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 889-90 (5th Cir.) (Discussing application of joint and several liability to maritime co-defendants in comparative fault system), *reh'g en banc ordered*, 20 F.3d 614 (5th Cir.1994). Our review is *de novo*.

As stated, in requiring the 50% reimbursement, the district court relied on *Savoie*, 627, F.2d 722, 724, which allowed complete indemnity of the employer by a third-party tortfeasor. *Savoie* held:

> Because the employer will have to pay maintenance and cure regardless of the existence or degree of his employee's neglect, a negligent third party who caused or contributed to the

> employee's injury should reimburse the employer for this inevitable expense, even though the employee was partially to blame. *As between the innocent employer and the partially negligent third party, the latter should bear the burden of such payments* in the same manner a joint tort-feasor is liable to the injured victim of concurrent delicts.
>
> * * *
>
> Because [the employer] will have to pay full maintenance and cure to [the seaman, regardless of his negligence], [the tortfeasor] must reimburse [the employer] *for the entire payment made.*

627 F.2d at 724 (emphasis added). The district judge stated that, were this a case of first impression, he would not have required full reimbursement, but that he was bound by controlling precedent--*Savoie*.

Again trying to wiggle off the hook of binding precedent, Houma maintains that *Savoie* is not controlling, noting that

Savoie--decided in 1980--did not discuss the earlier extension of proportional fault principles to maritime cases. *Id.*; *see e.g.*, *Loose*, 670 F.2d 493, 501 (5th Cir.1982) (discussing Fifth Circuit's adoption of comparative fault system, which "eliminates the doctrine of contributory negligence. . .[and] apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none"); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 981-82 (5th Cir.1978) (court should consider "the concept of proportional fault" in maritime cases). Thus, we must examine this aspect of *Savoie* in light of *Reliable Transfer* and its progeny.

As noted, in originally ordering each tortfeasor to reimburse maintenance and cure only to the extent of their assigned fault (20% each), the district court relied upon *Adams*, 640 F.2d at 621 (1981). The answer to whether *Savoie* still controls is found in *Adams*. Unlike *Savoie*, it anticipates *Loose's* more explicit discussion of proportional fault principles. *See Loose*, 670 F.2d at 500-01.

In *Adams*, Eymard contracted with Texaco to service its offshore operation; Adams, an Eymard employee, was injured while working on Eymard's crewboat. 640 F.2d at 619. He sued Eymard and Texaco; both cross-claimed for indemnity and contribution. Prior to trial, Adams settled with Eymard; the jury awarded damages to Adams, with Adams adjudged 70% negligent and Eymard and Texaco 15% each. *Id.* The cross-claims were tried to the court; Texaco was ordered to pay Eymard 15% of its maintenance and cure cost by way of contribution.

In affirming Texaco's contributing 15% to Eymard, our court noted that, even where the seaman is negligent, a "non-negligent shipowner is still entitled to indemnity from a third-party tortfeasor. *Savoie, supra*". *Id.* at 620. It noted that "[t]his court has already held [in *Savoie*] that a tortfeasor is required to *indemnify* the *non-negligent* shipowner for maintenance and cure payments *that result from the tortfeasor's negligence.*" *Id.* (Emphasis added). But, the court noted that *Adams* presented a different situation, because not only the third-party, but also the

shipowner, was negligent. In such a case, the *Adams* court held,

> [t]his rationale [of *Savoie*] equally supports the conclusion that a *concurrently negligent* tortfeasor should *proportionately contribute* to maintenance and cure paid by a negligent shipowner when the latter's negligence only concurrently contributed to the seaman's injury.

Id. at 621 (citing proportional fault cases) (emphasis added). The court held that, because both were concurrently negligent, Texaco was liable to Eymard for the "costs of those [maintenance and cure] payments *to the extent occasioned by its fault.*" *Id.* (emphasis added); *accord Black,* 860 F.2d at 32-34 (discussing innocent shipowner's right to indemnification from tortfeasor, versus negligent shipowner's right to contribution from tortfeasor in proportion to that party's negligence; citing *Adams* and *Savoie*).

As noted, in *Adams* both the shipowner and Texaco were found 15% at fault; the seaman, 70%. Our court concluded that

Texaco was required to contribute only 15% of the maintenance and cure to the shipowner. Were we to use the same method of apportionment in this case, Houma would be required to contribute only 20% of the maintenance and cure, because this was its percentage of fault. As reflected above, however, what distinguishes this case from *Adams* is that Energy was not at fault. Thus, as the district court held, this case is controlled by *Savoie*, where only the seaman and the third-party were at fault. Although the third-party was not 100% at fault (it shared fault with the seaman), it was nonetheless required to reimburse all of the maintenance and cure to the innocent shipowner. *Savoie*, 627 F.2d at 724.

Read together, *Adams* and *Savoie* seem to advance a policy choice as to which party bears the burden of a seaman's negligence when an employer seeks recovery over for maintenance and cure. When the employer is partially at fault, the seaman's negligence is imputed to the employer. This is consistent with the very basis for the maintenance and cure

obligation--the employment relationship. Between a negligent employer and a negligent third-party, the seaman's portion of the fault is imputed to the employer. But, when the employer is fault-free, it may recover all of the maintenance and cure form the negligent third-party(ies), even though the third-party shares fault with a negligent seaman. Therefore, Houma and Freeport, each only 20% at fault must nevertheless totally reimburse the maintenance and cure.

In sum, neither, *Adams*, nor subsequent proportional fault cases, including *Loose*, disturb *Savoie*'s holding that an innocent shipowner is entitled to full reimbursement for maintenance and cure from a third-party tortfeasor, even though the employee was also at fault. Accordingly, as did the district court, we must also follow *Savoie*.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

1. The parties agreed to a summary disposition, with each

submitting proposed findings of fact and conclusions of law, together with depositions and documentary evidence.

2. One driving factor behind maintenance and cure is that seamen are peculiarly "poor and friendless" and therefore deserve special treatment, regardless of their own behavior. Perhaps the most famous (and often-quoted) language about the special duty owed to seamen by their employers may be Justice Story's, from *Harden v. Gordon,* 11 F.Cas. 480 (C.C.D.Me 1823), the landmark case for modern American maintenance and cure:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, poverty, and sometimes perish form the want of suitable nourishment. . .

> On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well, to prevent diseases, as to ensure a speedy recovery for them. He will never be tempted to abandon the sick to their forlorn fate, but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.

Id. at 483, *quoted in, inter alia,* 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-28, at 351 (2d ed. 1994) (hereinafter cited as Schoenbaum); *see also Farrell v. United States*, 336 U.S. 511, 516, 69 S.Ct. 707, 710, 93 L.Ed. 850 (1949) (Employer knows "he must maintain and care for even the erring and careless seaman, much as a parent would a child."),

quoted in 1 Schoenbaum § 6-31, at 356.

3. Energy characterizes its claims against Houma and Freeport as for "indemnity and/or contribution"; it seeks "full reimbursement...for the amounts paid in maintenance and cure, because Energy...was found free from fault in the accident." Indemnity permits the indemnitee "to shift all the loss onto another tortfeasor", whereas contribution "requires that each tortfeasor pay the proportion of the damages attributable to its actions." *Hardy v. Gulf Oil Co.*, 949 F.2d 826, 830 (5th Cir.1992) (citations omitted). Because Energy seeks "full reimbursement" from Houma and Freeport (regardless of the fact that Energy's employee's (Bertram's) negligence also contributed to the accident (60% at fault) that necessitated the maintenance and cure), its claim is for indemnity.

4. Most courts followed *Waterman's* reasoning rather than that of *The Federal*. Within the Second Circuit, decisions casting doubt on the continued validity of *The Federal* culminated in its being overruled in 1988 (a fact not noted by Houma, which urges us to follow *The Federal*). *Black v. Red Star Towing & Transp.*

Co., Inc., 860 F.2d 30, 34 (2d Cir.1988) (en banc) ("after sailing in Second Circuit waters for six decades, *The Federal No. 2* formally is abandoned") (citing, *inter alia, Savoie* and *Adams*); *see also* Grant Gilmore and Charles L. Black, The Law of Admiralty, § 6-18 at 318-19 & n. 93j (hereinafter cited as Gilmore and Black); 1B Benedict § 47 at 4-27 (discussing criticism of *The Federal*); *Gooden v. Sinclair Refining Co.*, 378 F.2d 576 (3rd Cir.1967) (following *Waterman*); *Gore v. Clearwater Shipping Co.*, 378 F.2d 584 (3d Cir.1967) (same); *United States v. The Tug Manzanillo*, 310 F.2d 220, 223 (9th Cir.1962) (same); *contra, United States v. Gallagher*, 467 F.2d 1103 (9th Cir.1972) (following *The Federal*).

5. Houma was aware, throughout the district court proceedings, that Energy sought reimbursement for maintenance and cure; and, it settled with Bertram knowing that Energy's claim remained. When Houma entered into its settlement with Bertram, and he moved therefore to dismiss his claim against Houma in May 1993, Houma had been on notice for over a year

(Energy's cross-claim was filed in March 1992) that Energy had been paying maintenance and cure to Bertram since the accident, and continued to pay it.

The Houma-Bertram settlement is not part of the record on appeal. Accordingly, there is no evidence before us that that settlement was intended to compensate Bertram for medical or living expenses (amounts owed him by Energy as part of its maintenance and cure obligation), rather than instead being a settlement for other damages resulting from Houma's negligence. But, even assuming *arguendo* that part of the settlement was for the grounds covered by maintenance and cure, this demonstrates why the third party tortfeasor should take a maintenance and cure claim against it into consideration, and adjust for it, when settling with the employee, or better yet, work toward bringing about a total settlement of all claims.

6. Houma does not contest the maintenance payments.

7. Houma also again contends, as discussed *supra*, that Bertram's injuries were caused by the medical treatment he received. We have already rejected this assertion.

8. In its reply brief, Houma asserts for the first time that some fault should have been apportioned to Energy. Generally, we do not address such belated claims. We decline to do so here.